UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 94-14-P-H***
	)	***(Civil No. 97-128-P-H)***
AARON JAMISON,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Alleging that he suffered the ineffective assistance of counsel during the trial and appellate phases of the underlying criminal proceeding, Aaron Jamison moves pursuant to 28 U.S.C. § 2255 for vacation of his conviction on charges of conspiracy to distribute cocaine and possession of cocaine with intent to distribute.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). Further, a petition for post-conviction review "must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. . . . Facts alluded to in an unsworn memorandum will not suffice." *U.S. v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995) (citations omitted), *rev'd on other grounds*, 137 L.E.2d 1001 (1997).

The defendant's section 2255 petition, made under oath, contains no factual allegations. Instead, the defendant relies on the allegations appearing in an accompanying memorandum, a document that is executed neither under oath nor on penalty of perjury. This is insufficient to meet

the requirement of a sworn set of allegations. *Id.* This fatal flaw itself justifies denial of the defendant's motion. Moreover, as to the defendant's assertions regarding the trial phase of the proceeding, the motion should be denied without an evidentiary hearing because the allegations of the defendant would not entitle him to relief in any event.

I. Background

Following a jury trial, the defendant was convicted of conspiracy to distribute and possession with intent to distribute cocaine or cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and possession with intent to distribute, or aiding and abetting the possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(B). Jury Verdict Form (Docket No. 29); Judgment (Docket No. 55). The jury convicted co-defendant Eugene Martin of the same charges. Jury Verdict Form.

At trial, agent Michael Koneski of the Maine Drug Enforcement Agency ("MDEA") testified that on the night of January 25, 1994 he was working under cover as a potential purchaser of illegal drugs. Trial Transcript ("Tr.")[1] at 12-13. Koneski further testified as follows: Wayne Castalino, an informant, telephoned a woman named Roxann Sullivan and asked her if he and his friend "Mike," by whom Castalino meant Koneski, could purchase some cocaine. *Id.* at 13. Sullivan agreed, but stated that she would have to make a phone call first. *Id.* Approximately 20 minutes later, Castalino indicated that Sullivan had instructed him to meet her at a convenience store in Berwick, Maine to exchange $250 for an "eight-ball" of cocaine. *Id.* at 13-14. Koneski and

[1] The trial transcript is in three volumes. The first two volumes (Docket Nos. 61 and 62) are pagenated consecutively; the third (Docket No. 65) is not. Therefore, references to the first two volumes are denominated simply as "Tr." whereas the third volume is cited as "Tr. III."

Castalino went to the designated meeting place, and found Sullivan waiting for them in a car. *Id.* at 14. After some negotiation about whether the money or the drugs would be produced first, Sullivan told Koneski to wait at the meeting place while she went to get the cocaine. *Id.* at 14-15. She returned a few minutes later, invited Castalino to sit in the passenger seat of her car and dropped a small plastic package into his lap. *Id.* at 15. Koneski examined the package and believed it to contain crack cocaine. *Id.* Sullivan was arrested. *Id.* at 17.

MDEA agent Stephen Shea testified that he persuaded Sullivan to cooperate with his agency's investigation. *Id.* at 37-38. Shea further testified that he and Sullivan went to a pay phone, where she dialed a toll-free telephone number that allowed her to page her source of cocaine. *Id.* at 40, 42. Several minutes later the phone rang, Sullivan answered it, and she asked to speak with a person she identified as "A." *Id.* at 43. A second person came on the line to speak with Sullivan, and told her to call back in 15 minutes. *Id.* at 44. She followed these instructions, and the two ultimately arranged to meet at the same convenience store where the arrest had taken place. *Id.* 43, 45. A tape recording of these phone conversations was admitted into evidence. *Id.* at 45-46.

According to the testimony of MDEA agent Kenneth Pike, a van containing three men thereafter arrived at the convenience store and Sullivan — wearing a concealed microphone and transmitter — entered their vehicle. *Id.* at 220-21. Through the transmitter, Pike heard Sullivan discussing the cocaine transaction with the occupants of the vehicle. *Id.* at 221. The three occupants of the van were Martin, in the driver's seat, the defendant, seated next to Martin, and Harry Jamison, seated in the rear. Tr. 24-25; 31. All three were arrested at the scene. *Id*. at 24-26; 221-22.

Pike testified that as Martin got out of the van as instructed by the arresting officers, a pager fell to the ground. *Id.* at 223. Thereafter, Pike observed a can of "Pledge" furniture polish on the

floor next to the front passenger seat. *Id.* According to Pike, he opened the bottom of the container and found three or four plastic bags inside that contained a substance that appeared to be crack cocaine. *Id*. at 224. MDEA agent Guy Godbout testified that on the evening of the defendant's arrest he took from the defendant a pager that responded to the same telephone number used by Sullivan to initiate the drug transaction. *Id*. at 251-52.

Sullivan testified as a prosecution witness at trial. *Id*. at 79. Prior to her testimony and with the jury not present, the defendant's trial counsel advised the court that he intended to impeach Sullivan with certain inconsistent statements she had previously made. *Id.* at 68. He further communicated his expectation that the government would seek to rehabilitate her by having her testify that she made inconsistent statements because she was afraid of the two co-defendants. *Id.* Counsel indicated that he did not object to her so testifying, but that he was concerned that Sullivan would also state that the defendant had "killed somebody in New York" and that he and his co-defendant "had beaten somebody up." *Id.* The government advised that Sullivan had made such statements to the grand jury notwithstanding a warning from him not to do so. *Id.* at 69. The government also indicated that it would be offering evidence, through Sullivan and another witness, of the co-defendants' involvement in a drug-related beating for the purpose of establishing the existence of a conspiracy. *Id.* Over the defendant's objection based on Fed. R. Evid. 403, the court indicated that it would admit such testimony solely for that purpose, subject, if the defendants desired, to a cautionary instruction to the jury. *Id.* at 74-76. However, the court cautioned the government to avoid eliciting testimony about the reasons for Sullivan's fears, advising counsel for both defendants that there would be no recourse if they asked her such a question. *Id.* at 70.

Sullivan testified that she obtained the cocaine she sold to Koneski and Castalino from the

defendant, who was with her when Castalino placed his initial telephone call. *Id.* at 80-81. She further testified that the beeper number she later called belonged to the defendant, that he was the person who had asked her to call back, that when she did so co-defendant Martin — whose nickname is "Diesel" — answered, and that when she asked Diesel for "A" she was referring to the defendant. *Id.* at 84, 87. She further testified that it was the defendant who handed her cocaine on her second trip to the convenience store. *Id.* at 90. She also told the jury that she had received crack cocaine from the defendant "50 or more" times, although she had initially told the drug agents she had only done so approximately ten times. *Id.* at 93. She attributed her prior false statement to being "quite shaken up and confused" on the night of her arrest. *Id.* Sullivan also testified that she initially told the agents she had known co-defendant Martin for only a few weeks, when in fact she had known him since the fall of 1993. *Id.* at 95. She attributed this false statement to being "scared." *Id.* She testified that, under pressure from counsel for co-defendant Martin, she signed a false affidavit stating that Martin had not been aware of or involved in the drug transactions that occurred on the evening of her arrest. *Id*. at 96.

It was also Sullivan's testimony that she began using cocaine in March 1993, when she was living with Arthur Myers, father to one of her four children. *Id.* at 103. Sullivan testified that the defendant was the source of the couple's cocaine. *Id.* By August of that year, according to Sullivan, she was paying for her cocaine by letting the defendant and his associates use her car and also by making deliveries of cocaine for the defendant. *Id.* at 104-05. She stated that Myers was paying for his cocaine by doing auto mechanic work and also by making drug deliveries for the defendant. *Id.* at 104, 107. Ultimately, according to Sullivan, Myers and the defendant formed an auto repair business. *Id.* at 108. Sullivan also testified about the incident discussed by counsel in chambers, in

which the two co-defendants assaulted a former associate identified as "Leon" because, according to Sullivan, he had been cheating the defendant out of money and drugs. *Id*. at 111, 114. According to Sullivan, Myers was in the room while this assault occurred. *Id*. at 114.

Myers also testified for the government, describing the auto repair business he and the defendant purchased, *id.* at 180-82, his sale of drugs on behalf of the defendant, which allowed Myers to pay for his own cocaine use, *id*. at 176, 178-79, and his involvement in the beating of Leon, *id*. at 184-85. Myers testified that on occasion the defendant would call him from New York and direct him to deliver drugs to the defendant's customers. *Id*. at 187-88. According to Myers, the defendant's practice was to have him retrieve drugs the defendant had hidden in a can of "Pledge" furniture polish or "Ajax" cleanser, both with false bottoms. *Id*. at 188.

Edward MacColl testified as a defense witness. Tr. Vol. III at 25. MacColl, an attorney, represented co-defendant Martin prior to the case coming to trial. Id. at 26-27. Under questioning by Martin's trial counsel, MacColl stated that he had approximately six telephone conversations with Sullivan while he was investigating the case, that Sullivan "never hesitated, always provided what seemed to be full and complete answers and never expressed any concern about talking" with counsel to the defendant, and that she "volunteered" to execute the affidavit she ultimately signed. *Id*. at 29, 30, 33. He described Sullivan as seeming "at ease" when he visited her personally to have her complete the affidavit. *Id.* at 36.

The defendant opted not to take the stand. *Id.* at 22-23. Only one witness testified in support of the defendant's theory, that Arthur Myers rather than Aaron Jamison was the "A" from whom Sullivan purchased the drugs. This witness was Katrina Gary, called by the defendant. *Id*. at 44. Gary testified that she drove with Myers in his van to his garage business on January 25, 1994 to

look at a car that Myers had for sale. *Id.* at 47. According to Gary, the two left the garage shortly before 9:00 p.m., Myers carrying a can of furniture polish. *Id.* at 48. Gary testified that the two drove to a convenience store, that Myers did not go into the store but instead met in the parking lot with a woman in a "little black small car." *Id*. at 49. Gary testified that she and Myers then drove to an apartment complex in Portsmouth, New Hampshire, where Myers instructed her to get out of the van and into a nearby car. *Id*. at 50. She did so, waited about ten minutes, observed Myers get into the car with her and then saw the defendant — with whom she was acquainted — come out of the building. *Id.* She said that she found this "strange" because the defendant said nothing to her. *Id*. at 50-51. According to Gary, Myers dropped her off at home shortly after 11:00 p.m. *Id*.

Following the guilty verdict returned by the jury against both co-defendants, the two jointly filed a *pro se* motion alleging that their trial counsel had been ineffective (Docket No. 31). The two attorneys — Robert Napolitano for the defendant and Peter Rodway for co-defendant Martin — thereafter moved to withdraw their appearances, and the court granted their motion (Docket No. 32). The court thereafter appointed attorney Ricky Brunette to represent the defendant, who prior to sentencing moved *pro se* to relieve Brunette of his representation (Docket No. 42). Brunette ultimately withdrew this motion on behalf of his client (Docket No. 43).

The defendant appeared for sentencing on May 11, 1995. Sentencing Tr. (Docket No. 60). At the hearing, in order to assess whether the defendant's sentence should be enhanced for obstruction of justice, the court heard testimony from Godbout. *Id*. at 12. Godbout testified about the investigation he conducted concerning an allegation made by the defendant that he had paid Napolitano for legal services with cocaine. *Id.* at 14, 16. According to Godbout, Jamison had told the authorities that one Trina Geary, who apparently is the same person identified in the trial

transcript as Katrina Gary, facilitated the transmittal of 500 grams of cocaine to Napolitano. *Id*. at 26-27. Godbout testified that his investigation led him to the conclusion that Napolitano had met with Geary, but only to discuss her trial testimony. *Id*. at 24-27. According to Godbout, the government concluded that the defendant's allegations against Napolitano were unsupported, unsubstantiated and false. *Id*. at 35. Godbout also stated that the investigation "disproved" the defendant's separate allegation that Sullivan and Myers gave perjured testimony at trial, the latter having falsely stated that the defendant was the leader of the drug conspiracy. *Id*. at 20-21, 35. Relying on this testimony, the court concluded that the defendant had obstructed justice so as to warrant a two-level increase under the U.S. Sentencing Guidelines. *Id*. at 78. Accordingly, the court sentenced the defendant to 236 months of incarceration, which was at the middle of the applicable sentencing range under the Guidelines. *Id*. at 86.

Judgment was entered accordingly on May 19, 1997 (Docket No. 55) and the clerk filed a notice of appeal at the request of the defendant three days later (Docket No. 57). Brunette subsequently entered an appearance as the defendant's appellate counsel and moved for an enlargement to August 14, 1995 of the time in which to file a brief. Exhs. 4 and 5 to Government's Objection (Docket No. 75). As grounds for the enlargement, Brunette noted that part of the trial transcript had been sent directly to the defendant at the federal prison in Raybrook, New York and that Brunette had not yet received it. The First Circuit granted the motion. Exh. 6 to Government's Objection. Brunette ultimately obtained two more extensions of time, one *nunc pro tunc*. Exhs. 8-13 to Government's Objection. Finally, after notifying both the defendant and Brunette by letter dated October 11, 1995 that the appeal would be dismissed absent further action by the defendant by October 25, 1995, the First Circuit dismissed the appeal for want of prosecution by order entered

on November 14, 1995. Exhs. 14 and 15 to Government's Objection. The defendant's *pro se* motion for post-conviction relief followed.

II. Lack of Sworn Allegations

The defendant filed his motion on the pre-printed form commonly used for such pleadings, duly affixing his signature following the declaration under penalty of perjury that the statements included therein are true and correct. Motion under 28 U.S.C. § 2255 (Docket No.71) at 7. However, other than averring ineffective assistance of counsel as the basis of the motion, this filing contains no factual statements and instead refers the court to the memorandum the defendant submitted contemporaneously. *Id*. at 5. The memorandum, in turn, is neither sworn nor executed under penalty of perjury. However, two sets of verified allegations are among the attachments to the memorandum. The first is an affidavit of Harry Jamison, in which he states that he was "at the scene when the alleged drug transaction took place," "saw every detail," was willing to testify, but was neither interviewed nor called to the witness stand by the defendant's trial counsel. Affidavit of Harry Jamison ("H. Jamison Aff."), appended to Defendant's Memorandum. A second affidavit was executed by the defendant himself. Affidavit in Support of U.S.C. § 2255, appended to Defendant's Memorandum. In it, the defendant states that he provided Napolitano with a written and oral version of the events leading up to his arrest, along with the names of eyewitnesses who were present to corroborate the defendant's version of events. *Id.* The defendant also avers that he told Napolitano that he was not the "A" with whom Sullivan spoke on the telephone on that date. *Id.*

In its opposition to the defendant's motion, the government raised the issue of the lack of sworn allegations. In response, the defendant appended to his reply memorandum a third affidavit,

in which the defendant describes in some detail the version of events he had supplied to Napolitano prior to trial. Amended Affidavit in support of U.S.C. section 2255, appended to Petitioner's Reply ("Amended Affidavit") (Docket No. 77).

The net result is that the only factual allegations presented to the court under penalty of perjury are (1) that Harry Jamison, an eyewitness to the drug transaction at issue, would have been willing to testify at his brother's trial but was not contacted by the defendant's trial counsel, and (2) the defendant's recitation of what he told his trial counsel concerning the date of his arrest. Among the subjects not covered by any statements executed under penalty of perjury are the substance of the testimony Harry Jamison would have offered, any direct account (as distinct from a recitation of what the defendant told his attorney) of the events leading up to the defendant's arrest, and the communications between the defendant and his various attorneys at the different stages of the underlying criminal proceeding. These subjects go to the heart of the defendant's allegations concerning ineffective assistance. I am therefore constrained to agree with the government that the court must deny the petition for the reasons set forth in *LaBonte, supra*.[2]

III. Ineffective Assistance of Trial Counsel

The plaintiff makes a variety of allegations concerning the representation he received during the trial phase of the underlying proceeding, all of which coalesce around the general theme that Napolitano — as the attorney who actually conducted the trial on the defendant's behalf — did not

[2] Relying on *Davis v. United States*, 417 U.S. 333 (1974), and *United States v. Mitchell*, 85 F.3d 800 (1st Cir. 1996), the government separately argues that the defendant should be deemed to have waived his ineffective assistance argument by virtue of having presented, and withdrawn, a motion raising the issue after trial but before sentencing. Neither cited case stands for the proposition that the doctrine of waiver is properly applied in these circumstances.

embark upon a sufficiently thorough investigation and failed to mount a sufficiently vigorous defense before the jury. As the defendant notes, *Strickland v. Washington*, 466 U.S. 668 (1984), provides the applicable standard for assessing whether he has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. The defendant must show that counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

Perhaps the most significant of the defendant's contentions is his assertion that Napolitano failed to call witnesses who would have offered exculpatory testimony. He identifies two such witnesses: Harry Jamison and Lisa Mendez. The defendant nowhere sets forth what testimony these witnesses would have given. Harry Jamison's affidavit states only that he was "at the scene when the alleged drug transaction took place," "saw every detail" and "was willing to testify to the facts." H. Jamison Aff.. As for Mendez, the defendant states that she "could not be reached for a statement" "[d]ue to the lapse in time." Petitioner's Reply at 8 n.2.

In his own affidavit, the defendant avers that he gave the following account of the events in question to Napolitano prior to trial:

> On the night of January 25, 1994, myself, Harry Jamison, Eugene Martin, and [L]isa Mendez were in Portsmouth, N.H. waiting to attend a party. Arthur Myers gave myself and others permission to use his [F]ord van. As Arthur Myers pulled up, myself and others noticed he was with a female inside of [F]ord van, who we know to be Trina Geary. A pager goes off and "Diesal" is asked to call number on pager back. As myself and others were talking, "Diesal" says, "[H]old on, he's right here[,"] and hands the telephone to Arthur Myers and says "[It's] Roxann[."] After a brief conversation, Arthur hangs up telephone and asks me to "do him a favor." He explained that he wanted me to take this, (hands me aluminum foils), to Roxann for

> him because he was with Trina and didn't want Roxann to know. I agreed to go meet Roxann and asked the others to come along and we'll go to the party from there. Lisa Mendez changed her mind and didn't want to go, and left. We went to Cumberland Farms and [were] arrested.

Amended Affidavit at 1. It is significant that the defendant nowhere states that this version of the events at issue is, in fact, what actually occurred.[3] I do not mean to suggest that the defendant is obligated to come forward here with a sworn account of what transpired, having elected at trial to exercise his constitutional right not to testify. However, because the defendant now provides the court with neither his own description of events, as distinct from what he told his attorney, nor anything from which the court can discern what testimony the missing witnesses would have given, there is simply no basis from which the court can conclude that the failure to present their testimony "was anything other than a tactical decision." *Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993); *see also United States v. Alston*, 112 F.3d 32, 37 (1st Cir. 1997) ("pure speculation" that uncalled witness would have offered exculpatory testimony insufficient to sustain ineffective assistance claim).

A comparison to the *Lema* case is particularly instructive. There, as here, the defendant alleged that trial counsel neither interviewed nor presented three potentially favorable witnesses. *Id*. Noting the "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance," the First Circuit affirmed the District Court's decision to reject this aspect of the defendant's section 2255 motion without a hearing. *Lema*, 987 F.2d at 51 (quoting *Strickland*, 466 U.S. at 689), 54-55. The First Circuit observed that the government's case was "relatively

---

[3] I also note an apparent inconsistency between this version of what the defendant told Napolitano and the account in the defendant's memorandum of what he told counsel. According to the latter, the defendant had told Napolitano he "coincidentally rode 'into' the alleged pre-arranged drug buy." Defendant's Memorandum at 6.

weak," and therefore concluded that

> [r]easonably competent trial counsel might well have determined that the best prospect for acquittal lay in discrediting the government's witnesses, rather than presenting additional testimony which could appear to legitimate the government's case or raise questions about the defense not previously suggested by the government's evidence.

Id. at 54. Further, in light of these "obvious tactical risks and limited benefits," counsel's failure to interview these witnesses was also not ineffective assistance because

> [c]ounsel need not chase wild factual geese when it appears, in light of informed professional *judgment*, that a defense is implausible or insubstantial as a matter of law, or, as here, as a matter of fact and of the realities of proof, procedure and trial tactics.

Id. at 55 (citation omitted, emphasis in original). Notably, the First Circuit was able to reach this level of analysis, rejecting the government's position that the defendant's motion was too cursory on the issue, because the pro se defendant's affidavit "made clear the identities of the witnesses *and the nature of their anticipated testimony*." *Id*. at 54 n.5. The court was therefore in a position to assess the putative testimony against the *Strickland* standard in a meaningful way. *See id*. at 54-55 n.6-7 (noting that one witness's testimony would have required his waving privilege against self-incrimination, another's was likely inadmissible hearsay and the third's was "tenuous and collateral"). In the instant case, all the court is in a position to determine is that Napolitano failed to contact two witnesses who would have given unspecified testimony to contradict Sullivan's assertion that the defendant was the person from whom she had arranged to purchase cocaine, testimony that was itself buttressed by the tape recordings of the relevant phone conversations and evidence that the pager number Sullivan had contacted belonged to the defendant. In the circumstances, the showing made by the defendant on the issue of missing and non-interviewed

witnesses is well below the threshold for rebutting the presumption that counsel provided reasonable professional assistance.

The defendant also contends that trial counsel's impeachment of Sullivan — obviously the key government witness — was so lacking as to constitute ineffective assistance. The defendant concedes that Napolitano adduced evidence at trial that Sullivan had made prior inconsistent statements, but he derides this effort as one conducted "pre-maturely." Defendant's Memorandum at 48-49. He further asserts that (1) Napolitano should have adduced specific information about one of the prior inconsistent statements by introducing testimony from Philip Mancini, an attorney who interviewed Sullivan on the defendant's behalf prior to the trial, and (2) Napolitano should have sought the services of a voice expert who could have analyzed the taped phone conversations between Sullivan and "A." All of the foregoing, according to the defendant, would have tended to cast doubt on the government's theory of the case and bolster his own contention that the "A" with whom Sullivan arranged to purchase cocaine was Arthur Myers rather than Aaron Jamison.

A review of the trial transcript demonstrates that Napolitano's cross-examination was vigorous and hostile. He began by asking: "When did you start telling the police the truth that night?" Tr. at 124. He adduced that she had originally under-stated the number of times she had received cocaine from the defendant, that she had initially denied being a cocaine user herself, that she had lied when she told Mancini that co-defendant Martin was not involved in the transactions, and that she had initially told investigators she began dealing with the defendant in October 1993 when the correct date was seven months earlier, in March. *Id*. at 124-27, 130. He also explored the fact that Sullivan had reached a plea bargain in connection with criminal charges pending against her in state court, thus at least suggesting to the jury that her cooperation in the instant case was a

quid pro quo for leniency in the state prosecution. *Id*. at 133-34.

Napolitano did not fully unravel the conversation Sullivan had with Mancini. Asked by Napolitano whether she had been truthful in her conversation with Mancini, Sullivan stated, "There was no reason for me to be dishonest with Mancini because he had only asked me if I was sure of what was in the aluminum foil." *Id*. at 126-27. She indicated that she told Mancini that the foil contained cocaine she had received from the defendant. *Id*. at 127. Not revealed at trial was the discussion between Sullivan and Mancini about the "Pledge" can, at least as suggested by the unverified transcript of the conversation ("Mancini Tr.") attached as Exhibit J to the Defendant's Memorandum. Sullivan told Mancini that she did not see where the defendant got the cocaine he handed her immediately before her arrest, that she knew nothing about a "Pledge" can on the floor of the car in which they were sitting at the time, and that the only time she saw a "Pledge" can was when she was placed in the back of a police cruiser after her arrest and she observed a police officer carrying one in his back pocket. Mancini Tr. at 9. At trial, Sullivan unequivocally testified that the defendant "pulled out a Pledge can" and handed her an "eight-ball" of cocaine, and that she had seen this "Pledge can" before. Tr. at 90-91.

This strikes me as a minor inconsistency between Sullivan's trial testimony and her statements to Mancini. To determine in these circumstances that Napolitano was ineffective by failing to add this inconsistency to all the others he adduced would be to engage in precisely the kind of hindsight evaluation explicitly proscribed by *Strickland. See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). In other words, Napolitano's cross-

examination of Sullivan, while not embracing every prior inconsistent statement she made, and while not exploiting every possible inconsistency between statements made by Sullivan and the government's version of events, was clearly within "the wide range of professionally competent assistance" and therefore does not amount to ineffective assistance. *Id*. at 690.

The defendant's contentions regarding the lack of expert analysis of the recorded conversations relies on *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982). In *Baynes*, the government's entire drug-conspiracy case against the defendant consisted of only 12 words of electronically intercepted telephone conversation. *Id*. at 662. The government had obtained an exemplar of the defendant's voice, which it did not introduce at trial. *Id*. Defense counsel had never compared the exemplar to the recorded conversation despite repeated urgings from his client. *Id*. at 663. The Third Circuit concluded that, in the circumstances, failure to make "a careful and comprehensive comparison of the two recordings" was ineffective assistance. *Id*. at 667.

The instant case is highly distinguishable from *Baynes*. Here, the government's case did not turn entirely, or even substantially, on the taped conversations. There was ample other evidence from which the jury could conclude that the defendant sold Sullivan the drugs. The Sixth Amendment does not require a defense attorney to obtain the services of a voice expert every time the government uses a taped phone conversation as part of its case.

The remainder of the defendant's contentions do not require extensive discussion. The defendant contends that Napolitano should have presented evidence that Myers was the owner of the van in which the defendant was arrested and should have noted for the jury that some of the cocaine involved in the case had been stored in plastic bags whereas the contraband involved in the transaction that led to the defendant's arrest was wrapped in aluminum foil. Even if the court could

attribute the decision not to stress these details to anything other than trial strategy, they plainly are not of sufficient magnitude to render the result of the trial so unreliable as to implicate the prejudice prong of the *Strickland* test. The same is true of the defendant's contentions concerning allegedly missing drugs. According to the defendant, each of the two drug transactions in the case — i.e., Sullivan's sale to Koneski and Castalino, followed by the defendant's sale to Sullivan — involved an "eight-ball" of cocaine, weighing 3.5 grams and thus the case involves seven grams of the illegal substance. Defendant's Memorandum at 32. However, the defendant further contends, the government produced only a total of 3.9 grams of cocaine at trial. He thus asserts that 3.1 grams of drugs are "missing," and that this fact somehow supports his theory that Myers and not the defendant was the perpetrator. *Id*. Assuming that the evidence adduced at trial suggests that any cocaine was missing, the defendant has not shown how his attorney's failure to make this clear to the jury was in any sense outcome-determinative.

In sum, even if the court were to credit all of the unsworn allegations made by the defendant in his motion for collateral relief, he has not made the requisite showing under *Strickland* as to the trial phase of the underlying proceeding. Therefore, to the extent that his motion raises issues about the trial and his attorney's preparation for it, the motion would merit denial even if the allegations contained therein were duly verified.

IV. Ineffective Assistance of Appellate Counsel

The same cannot be said of the defendant's contentions concerning his attorney's failure to pursue a direct appeal of the conviction. It is the law in this circuit that when a criminal defendant is deprived of his right to appeal as the result of his counsel's dereliction, he is entitled via section

2255 to have his appellate rights restored without making any showing as to the merits of the issues he would appeal. *Bonneau v. United States*, 961 F.2d 17, 23 (1st Cir. 1992); *see also Scarpa v. Dubois*, 38 F.3d 1, 13 n.7 (1st Cir. 1994) (contrasting counsel's "inept performance" with "no performance"). The government would have the court deviate from this principle on the ground that co-defendant Martin perfected his appeal without any success. According to the government, in these circumstances the court should at least require the defendant to identify the issues he would raise on direct appeal. I disagree. The case law could not be more plain in declaring that a criminal defendant who never had an opportunity to appeal because of dereliction of counsel "must be treated exactly like any other appellant appealing for the first time." *Bonneau*, 961 F.2d at 23 (quoting *Rodriquez v. United States*, 395 U.S. 327, 330 (1969)). It would be inconsistent with this principle to require the defendant to show why his appeal would be successful where his co-defendant's was not.

In consequence, the lack of verified allegations in the defendant's motion looms large. According to the defendant, his appellate counsel simply failed to file a brief after repeated deadline extensions notwithstanding repeated exhortations from the defendant to do so. If so, this might entitle the defendant to relief, assuming that other circumstances do not account for the procedural default. *See* Government's Memorandum at 43 (contending that all materials related to appeal were mailed to defendant in prison at his request, thus depriving his counsel of ability to perfect appeal). Nevertheless, the court is simply not in a position to credit unverified factual allegations made by a defendant seeking section 2255 relief — a deficiency of which the defendant was placed on notice by virtue of the government's opposition. The defendant's reply makes clear that he understood the problem, opting to cure it selectively by verifying some allegations but not others. In the

circumstances I have no hesitation in recommending that the defendant's motion be denied without an evidentiary hearing, even as to those aspects of it that would state a cognizable claim if presented under oath or on penalty of perjury.

V. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 20th day of August, 1997.

_____

David M. Cohen
United States Magistrate Judge